IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 459.

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE, and ENGINEERING TIMBER COMPANY, LTD.,

Petitioners,

against

FRENCH OVERSEAS CORPORATION, as Owner of the Schooner *Malcolm Baxter, Jr.*,

Respondent.

IN THE MATTER

of

The Petition of FRENCH OVERSEAS CORPORATION, as owner of the Schooner *Malcolm Baxter, Jr.*, for Limitation of Liability.

REPLY BRIEF FOR PETITIONERS.

I. The respondent's argument is built around the following statement, which appears on page 1 of its brief:

> "Indeed, the entire petition and supporting brief are based on the misapprehension that the respond-

> ent relies on a contract provision or exception of 'restraint of princes' or otherwise, whereas the defense actually is that when the embargo was declared further performance became illegal."

That statement is wholly incorrect.

It is not warranted by anything expressed or implied in the petition herein.

The existence or non-existence of a contract provision or exception of "restraint of princes" has nothing whatsoever to do with the questions of law which the petitioners are raising before this Court.

In those portions of the petition and brief in support thereof which are quoted at pages 24-26 of the respondent's brief, the use of the phrase "special contract" has no reference to any "restraint of princes" clause, but refers to the special prepaid freight clause, under which the respondent is seeking to retain unearned freight, in spite of its own flagrant breach of the contracts of carriage.

II. The respondent's brief, in its lengthy argument that its defense is based on a theory of "illegality", ignores the real questions of law which the petitioners are raising.

It makes no difference whether the effect of the Governmental embargo is referred to as "illegality", "impossibility", or "restraint of princes". The nature of the defense put forward by the respondent under the embargo—*i. e.*, frustration—cannot be obscured by the word used to describe it.

The real question here is not the terminology of the respondent's defense under the embargo, but is *whether that defense is available to the respondent at all.*

The petitioners are asking whether a shipowner may put forward a Governmental embargo as a defense to the nonperformance of a voyage, *on any theory*, when the shipowner's own flagrant breach of contract was the direct and immediate cause of the vessel being "caught" by the embargo.

Or, to put it in another way, can a shipowner urge, *on any theory*, a Governmental embargo as a defense, whether described as an "illegality", "impossibility", or otherwise, when the vessel, by reason of the owner's flagrant breach of contract, was not ready and able to perform the contracted voyage at any time previously to the levying of the embargo?

May a shipowner, *on any theory*, contend, as a proposition of law, that a Governmental embargo excuses him from the nonperformance of a contracted voyage, on the ground that the embargo made permanent the already existing INABILITY of performance on his part, due to his own earlier and flagrant breach of contract?

If, as the respondent contends, he is thus excused, there is certainly no authority in this court for any such proposition, and it is important that this Court should render a decision on this question *which is of great importance in maritime law*.

III. The statements at pages 7, 17, 22 and 23 of respondent's brief, that the case involves solely questions of fact, and that the petitioners are seeking a review of the testimony, are unwarranted.

The facts are fully settled in the petitioners' favor by the decisions of the lower courts.

The only questions as to which the lower courts were not in accord are *questions of law*, as to how far, if at all, the respondent herein can escape liability for the results of the schooner's *failure to carry the cargo to destination*.

It is solely as to those questions of law that the petitioners are now asking this Court to review the case.

IV. It is obvious, from the undisputed facts in the testimony, that, if the respondent had performed its contract, and if the *Malcolm Baxter, Jr.*, had been ready and able to perform the voyage, she would have been well on her way across the Atlantic, long before the embargo of September 28th, 1917, and would never have been "caught" by the embargo.

While it may be perfectly true that ultimately she could not proceed from Havana because of the embargo, just as the *Henry W. Cramp* could not proceed from Norfolk (*Cf. The Henry W. Cramp*, decision printed as appendix to the petition herein), nevertheless, in this case, as in the case of *The Henry W. Cramp*, the schooner would never have been affected by the embargo, nor come under the embargo's restraint, if it had not been for the respondent's flagrant breach of contract, which necessitated the schooner putting into the port of Havana for repairs.

Therefore, when one considers the question of the damages to the petitioners which flow from the respondent's initial breach of the contract, it is obviously a question of law as to how far all of the damages sustained by the petitioners' by reason of failure to deliver the cargo at destination, may be said to have been the direct and proximate result of the respondent's breach of warranty of seaworthiness.

V. The respondent's brief in opposition, at page 17, contains the assertion that there is not a scintilla of evidence to controvert the proposition that the schooner was rendered seaworthy by the repairs made at Havana.

The petitioners submit that this is immaterial, because the contract was not for a voyage from Havana in January, 1918, but a voyage from New Orleans, in August, 1917.

But it should be noted that the schooner's log shows that, shortly after leaving Havana, she was leaking to a substantial extent (*R. fols.* 684, 685), and although her master testified that, on arrival at New York, she was substantially in the same condition as when she left Havana (*R. fol.* 376), her log shows that, on arrival at New York, while anchored in the quiet waters of the Harbor, she was leaking to the astonishing extent of 26 inches of water an hour, or 52 feet in every 24 hours! (*R. fol.* 690). Moreover, the District Court expressly found that,

> "The repairs lavished upon her first at Hoboken and then at Havana did not serve materially to strengthen and improve her condition" (*R. fol.* 920).

The Circuit Court of Appeals in its opinion did not disturb that finding of fact.

VI. The statement at page 38 of respondent's brief in opposition, that the case of *The Henry W. Cramp* was decided before the filing of briefs or argument in the Circuit Court of Appeals in the case at bar, is an error. The case at bar was argued in May, 1927, and the decision was filed on June 6th, 1927, whereas the decision in the *Henry W. Cramp* case was not filed until June 13, 1927.

It is sufficiently obvious, therefore, why the decision in the case of the *Henry W. Cramp* was not referred to on the argument of the appeal in the case at bar.

VII. The respondent, at page 38 of its brief in opposition, argues a distinction between the case at bar and the case of *The Henry W. Cramp* on the ground that, here there was no intent on the part of the master of the *Malcolm Baxter, Jr.*, to deviate, whereas there was intent on the part of the master of the *Henry W. Cramp*.

In the case of *The Henry W. Cramp*, the vessel, because of the negligence and unjustifiable omissions of her owner and master, was placed in a situation in which the completion of the voyage was subsequently prevented by the embargo. The Circuit Court of Appeals for the Third Circuit, in that case, for those reasons, declined to allow the vessel and her owner any defense based on the embargo.

In the case at bar, the *Malcolm Baxter, Jr.*, similarly, because of the negligence, breach of warranty, and unjustifiable omissions of her owner and master, was placed in a situation in which the embargo subsequently prevented the completion of the voyage. Yet the Circuit Court of Appeals for the Second Circuit in this case, although finding the negligence, breach of warranty, and omissions as facts, has allowed the vessel and her owner to escape liability for failure to deliver the cargo at destination, and has sustained its defense of the embargo.

These decisions of the two Circuits are directly opposed in principle.

The suggestion of respondent herein that there is a distinction between the two cases, because the negligence and unjustifiable omissions of the owner and master were conscious in one case, and unconscious in the other, is a

subtle refinement which does not appear to be supported by any principles of law.

Whether any such distinction be good or not is a question which should be settled finally by this court, inasmuch as it has a most direct and important bearing on all maritime contracts of affreightment.

VIII. Counsel for your petitioners herein are advised that, in the case of *The Henry W. Cramp*, a petition for certiorari to the Circuit Court of Appeals for the Third Circuit is now before or is about to be presented to this Court, and that counsel for the *Henry W. Cramp* are also contending that the decision of the Circuit Court of Appeals for the Third Circuit in that case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar.

IX. On behalf of the petitioners, it is again submitted that this case, on the established facts, raises important questions of law as to which there has been a disagreement, not only between the lower courts herein, but also between the Circuit Court of Appeals for the Second Circuit in this case, and the Circuit Court of Appeals for the Third Circuit in the case of *The Henry W. Cramp;* and that the petition for certiorari should be granted, in order that these important questions of law may finally be settled by this Court.

Respectfully submitted,

JOHN M. WOOLSEY,
MARK W. MACLAY,
ROBERT S. ERSKINE,
CHARLES K. CARPENTER,
HARRY M. ZUCKERT,
Counsel for Petitioners.